82-895

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1982

JAMES MARSHALL,

Petitioner,

- vs -

STATE OF OHIO,

Respondent,

PETITION FOR A WRIT OF CERTIORARI TO THE EIGHTH DISTRICT COURT OF APPEALS FOR CUYAHOGA COUNTY, OHIO

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STATEMENT OF THE QUESTION PRESENTED

I

Whether the Petitioner was denied the effective assistance of counsel and due process of law when his trial lawyer failed to investigate and raise potential defenses at trial and preserve same for appellate review.

PARTIES TO THE PROCEEDING

Petitioner:

James Marshall

Respondent:

State of Ohio

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1982

JAMES MARSHALL,

Petitioner,

- vs -

STATE OF OHIO,

Respondent,

PETITION FOR A WRIT OF CERTIORARI TO THE EIGHTH DISTRICT COURT OF APPEALS FOR CUYAHOGA COUNTY, OHIO

The Petitioner, James Marshall, prays that a writ of certiorari issue to review the judgment of the Ohio Court of Appeals, which judgment became final on September 15, 1982; when the Supreme Court of Ohio denied further appellate review.

OPINIONS OF THE COURTS BELOW

The judgment entries by the Supreme Court of Ohio overruling and dismissing our appeal are attached hereto as Appendices "A" and "B", infra, pp 1a - 4a in the Appendix to this Petition.

The Journal Entry and Opinion of the Eighth District Court of Appeals, the judgment to which this Petition is directed, is designated as Appendix "C" , p. 5a.

STATEMENT OF THE GROUNDS ON WHICH THE JURISDICTION OF THIS COURT IS INVOKED

The judgment of the Supreme Court of Ohio was entered on or about September 15, 1982. The jurisdiction of this Court

is invoked under Title 28 U.S.C. Section 1257(3).

CONSTITUTIONAL AND STATUTORY PROVISIONS WHICH THE CASE INVOLVES

The relevant constitutional and statutory provisions involved herein are set forth at Appendix "D", p. 32a.

STATEMENT OF CASE

This is an appeal from the decision of the Court of Appeals of the Eighth Judicial District affirming a denial of a Petition to Vacate Judgment, which judgment involved a sentence to a penal term for Felonious Assault.

This appeal is on a question of law. Petitioner was denied his Sixth Amendment right to the effective assistance of

counsel and thereby denied a fair trial and substantial justice.

The Petitioner James Marshall, was convicted of two counts of Felonious Assualt on July 2, 1975 and sentenced to concurrent two to fifteen year penal terms. Efforts to reverse the conviction by appeal to the Eighth Judicial District and to the Ohio Supreme Court have been exhausted. The Ohio Supreme Court denied further review on October 3, 1977.

Petitioner filed a Petition to Vacate Judgment initially on October 3, 1977, to which the State responded with a Motion to Dismiss. The trial court took no action on either Petitioner's Petition to Vacate or a Motion to Dismiss. Petitioner filed a second Petition to Vacate on November 24, 1980 when the appeal bond issued in February, 1976 was forfeited

and the Petitioner was arrested. The trial court denied Petitioner's Motion to Vacate on June 10, 1981 and the Court of Appeals subsequently affirmed on May 27, 1982. The Supreme Court of Ohio denied further appellate review.

STATEMENT OF FACTS

The essential facts relevant in this petition for writ involve the process by which the Appellant was identified by the State's witnesses as the assailant. The State's evidence consisted primarily of the testimony of Stanley Baker. Mr. Baker testified that he was driving a newly purchased 1968 Camaro on south bound Interstate 77, accompanied by his brother, Michael Baker, on February 14, 1975 at 7:30 p.m. Mr. Baker further

testified that as he was driving on the inside lane near the Clark Avenue Bridge, a dark green four door 1968 Oldsmobile pulled up along side the Stanley automobile. In the Oldsmobile were four adults and two children, according to Stanley Baker. The driver of the automobile motioned to the Bakers to roll down their window, reached into his glove compartment, and pulled out an automatic weapon and fired three shots at the Stanley car. The vehicles were traveling at a speed of approximately 40 miles an hour at this time. Baker stated that the assailant got off the interstate at Fleet Street but then he followed the Oldsmobile up the exit ramp in attempt to get the assailant's license plate and motive. Two more shots were fired at the Baker's automobile as it passed the assailant's

vehicle. Stanley Baker drove to the Newburg Heights police station to file a report on the incident. Stanley Baker identified the assailant to an on-duty officer as a "...dark skinned colored man approximately forty (40) years old, heavy-set."

Michael Baker substantially corroborated his brother's testimony. He admitted, however that he observed little concerning the second round of gunfire as he was on the floor of the automobile at the time.

On February 16, 1975, the Bakers were called down to the Cleveland Central Police Station on the pretext of viewing a possible line-up. Stanley stated that he identified the Petitioner who at the time was seated on a bench at headquarters with two other black males. One

man was fair skinned and the other was older than the Petitioner, bald and had a moustache. Stanley also admitted, after having his memory refreshed by being shown his written statement, that his brother was present when Stanley made his statement to the police and that he discussed the case with his brother.

Other testimony included that of Paul Bellito, a detective with the Cleveland Police Department. Detective Bellito testified that he and his partner verified the license check made by the patrolman upon the Baker's information, and at approximately 6:00 p.m., February 16, 1975 went to the Petitioner's home and arrested him. Petitioner was told about the accusations made against him and taken to the Central Police Station. Bellito asked the Petitioner if he would

participate in a line-up. According to Bellito and the Petitioner, although Petitioner replied "no" and requested a lawyer, Bellito told him to sit down on the bench with the two black males described above. He informed the Petitioner that he was going to request that Petitioner's accusers come down to the police station. Bellito phoned Stanley Baker and told him he had arrested a man and asked him to come down and possibly view a line-up. Both Bakers came down to the police station and walked by the bench that Petitioner shared with the two other men and went into the detective's office directly near the bench. Stanley Baker then identified the Petitioner as the Bakers' assailant and Michael subsequently concurred after Stanley made his identification.

ARGUMENT RELIED ON FOR ALLOWANCE OF WRIT OF CERTIORARI

This case presents the Court with the opportunity to further define the constitutional mandate that every criminal defendant is entitled to the effective assistance of counsel. The Court is here asked to consider whether trial counsel's failure to move to suppress an unlawful pretrial identification constitutes ineffective assistance of counsel, and thus a denial of the Petitioner's Sixth Amendment and Due Process rights. The Court has previously considered the issue of effective assistance of counsel in other areas, but is here asked to further explicate that right to mandate that the failure by trial counsel to raise a potential

objection to the introduction of tainted evidence that could convict the Petitioner, and to preserve that objection for appellate review, constitutes a denial of the Petitioner's Sixth Amendment and Due Process rights.

ARGUMENT

THE PETITIONER WAS DENIED THE EFFECTIVE ASSISTANCE OF COUNSEL AND DUE PROCESS OF LAW WHEN HIS TRIAL LAWYER FAILED TO INVESTIGATE AND RAISE POTENTIAL DEFENSES AT TRIAL AND PRESERVE SAME FOR APPELLATE REVIEW.

The Sixth Amendment to the United States Constitution guarantees that a criminal defendant shall enjoy the right

"to have the assistance of counsel for his defense." This Court has consistently held that this right extends beyond the mere formal appointment of a licensed attorney-at-law to represent a defendant. This guarantee was first interpreted by the Supreme Court to mean the effective assistance of the counsel in Powell v. Alabama, 287 U.S. 45, 54 S. Ct. 55, 77 L. Ed. 158 (1932). In Powell, Justice Sutherland went beyond a formal requirement that counsel be appointed, holding that the trial judge's failure:

> "to make an effective appointment of counsel had resulted in the denial of effective and substantial aid... [D]efendants were not accorded the right of counsel in

any substanial sense." 287 U.S. at 53, 71, 53 S. Ct at 65.

The Court went on to hold in Avery v. Alabama, 308 U.S. 444, 446, 60 S. Ct. 321, 322, 84 L. Ed. 377 (1940) that:

"The constitution's guarantee of assistance of counsel cannot be satisfied by mere formal appointment." 308 U.S. at 446.

The Court in Avery rested its decision on the Fourteenth Amendment, since a state defendant was involved, and held that the trial court's denial of a motion for continuance requested by appointed counsel had not deprived the defendant of the effective assistance of counsel.

Significantly, the Court reasoned on the facts of that case that:

> "His appointed counsel... have performed their 'full duty intelligently and well.'" 308 U.S. at 450.

The Court has enforced the unequivocal implication of Avery in Glasser v. United States, 315 U.S. 60, 62 S. Ct. 457, 86 L. Ed. 680 (1942), that an inadequate performance by counsel should render a conviction void. In Glasser, the holding was based upon the Sixth Amendment and the Court overturned a conviction of the defendant whose attorney was retained by a co-defendant with a potentially inconsistent defense. There the Court held:

> "Our examination of the record leads to the conclusion that representation of Glasser was not as effective as it might have been if the appointment had not been made. We hold that the Court thereby denied Glasser his right to have the effective assistance of counsel, guaranteed by the Sixth Amendment." 315 U.S. at 76, 62 S. Ct. at 468.

See also Holloway v. Arkansas, 435 U.S. 475, 98 S. Ct. 1173 (1978); compare Cuyler v. Sullivan, 446 U.S. 335, 64 L. Ed. 2d 333, 100 S. Ct. 1708 (1980). Thus, the Court has consistently recognized that trial counsel's performance, as effected by these factors, unques-

tionably impacts on the constitutionally guaranteed right to effective assistance of counsel.

In Reece v. Georgia, 350 U.S. 85, 76 S. Ct. 167, 100 L. Ed. 77 (1955), the Supreme Court essentially left no doubt that evidence of incompetence as such and basic procedural errors on the part of defense counsel, should be scrutinized in determining whether a defendant's assistance of counsel has been constitutionally adequate. In Reece, the Court held that the defendant was denied the right to effective assistance and thus to due process, where he did not have an attorney in time to object to the racial composition of the grand jury that indicted him. The Court's reasoning further establishes that this same right would be denied if an attorney had been

appointed but failed to object to the all-white grand jury composition before the grand jury returned its indictment.

The standard of effective assistance of counsel has been increasingly reinforced and further defined by the Court, as in McMann v. Richardson, 397 U.S. 759, 90 S. Ct. 1441, 25 L. Ed. 2d 763 (1970). This Court held in McMann that the advice rendered by an attorney as to whether a confession would be admissible in evidence is:

> "...within the range of competence demanded of attorneys in criminal cases." 397 U.S. at 771, 90 S. Ct. at 1449.

* * *

> "...if the right to counsel is to serve its purpose, defendants cannot be left to the mercies of incompetent counsel, and... judges should strive to maintain proper standards of performance by attorneys who are representing defendants in criminal cases in their courts." 397 U.S. at 771, 90 S. Ct. at 1449.

See also, Tollett v. Henderson, 411 U.S. 258, 267, 36 L. Ed. 2d 235, 93 S. Ct. 1602 (1973).

Moreover, the Court has emphasized the inapplicability of inquiry into the question of harmless error when the fundamental nature of the constitutional

requirement of effective assistance of counsel is considered. Rather, the Court has preferred to impose an unequivocally more stringent standard and to reject the harmless error evaluation:

> "The right to have the assistance of counsel is too fundamental and absolute to allow courts to indulge in nice calculations as to the amount of prejudice arising from its denial." Glasser, 315 U.S. at 76, 62 S. Ct. at 467.

See also Holloway v. Arkansas, supra.

In the instant case, the Petitioner's trial attorney failed to investigate all apparently substantial defenses available to the defendant and to assert those defenses in a proper and

timely manner. Significantly, the record reveals that the Petitioner was not afforded the legal protection and safeguards of a line-up when he was identified as the alleged assailant by the victims of the crime. The context in which the Bakers made the identification was peculiarly suggestive and prejudicial. Stanley Baker made his identification after previously being told to come down and possibly view a line-up that included the individual the police had arrested for the assault. The Petitioner was identified by the victims as he sat in between two other men who looked nothing like the description given of the assailant.

The Petitioner's trial counsel was unquestionably aware of the circumstances surrounding the identification, yet

failed to file a Motion to Suppress the Evidence of the pretrial identification. That Motion to Suppress, had it been successful, could clearly have tainted the witnesses' subsequent in-court identification rendering it inadmissable as well. The nonaction of counsel in moving to suppress highly prejudicial evidence constitutes as egregious an infringement on the right to effective assistance of counsel as not having an attorney to object to the racial composition of a grand jury that returns an indictment against a defendant. Reece, supra. Counsel's failure to make a pivotal motion to suppress is as severe an abrogation of the right to effective assistance as being represented by an attorney who also represents a co-defendant with potentially inconsistent

defenses. Glasser, supra. Trial counsel's neglect in failing to assert a motion to suppress the tainted pretrial identification is quite possibly more prejudicial to the Petitioner than is erroneous advice rendered by an attorney on the subject of whether or not a confession would be admissible in evidence. McMann, supra.

Counsel's failure to file a motion to suppress the out-of-court identification as well as the in-court identification constitutes an ineffective assistance of counsel since such a motion would arguably have disposed of the charges against the Petitioner. There is no question that without the identification of the accused as the perpetrator of the alleged Felonious Assault, that the accused's case would have been immeasur-

ably improved. In fact, without the pretrial identification and the tainted in-trial identification, in all probability the case against the Petitioner should have been dismissed as a matter of law under Rule 29 of the Ohio Rules of Criminal Procedure. Participation by the Petitioner's counsel in a motion to suppress may very well have resulted in the exclusion of any identification testimony of the accused in the alleged Felonious Assault.

Where a suggestive identification procedure has been used, as in the present case, and it is asserted that an independent basis exists for identification, the admissibility of the evidence of the identification is determined by at least five factors. They include (1) the opportunity afforded the witness to view

the criminal at the time of the crime; (2) the degree of attentiveness shown by the witness; (3) the accuracy of the witnesses prior identification of the criminal; (4) the level of certainty evidenced by the witness at the confrontation; and (5) the amount of time elapsing between the crime and the confrontation. Neil v. Biggers, 409 U.S. 188 at 199-200 (1972). See also Manson v. Brathwaite, 432 U.S. 98 (1977).

Given the circumstances of this case, it is doubtful that the witnesses had a good opportunity to observe the Petitioner. The witnesses were traveling at night, at speeds of at least 40 mph with a weapon allegedly pointed at them. One witness, who admitted being "scared", testified to having spent a good portion of his time on the floor boards of the

car once the weapon was brandished. Similarly, the other witness, asked to describe what the other parties in the assailant's car looked like, responded that "I wasn't looking for expressions on their faces when a guy's got a gun hanging out the window shooting at me." As the parties were anywhere from 100 feet to one-half mile away from the assailant thereafter, they had virtually no opportunity to observe anything more.

Moreover, the main witness' attentiveness to the incident was quite suspect. He was, after all, driving an automobile moving at highway speed. He evidenced confusion on several occasions as to which party, his brother or he, rolled down the window in response to the assailant's request, the distance between the two cars when the shooting commenced,

and to which side of the car the assailants initially pulled up to. Moreover, a discrepancy existed between the Baker's testimony and Detective Horner's report as to which hand the assailant used to discharge the gun. The other witness/victim, of course, could observe little while squatting on the floor boards of the vehicle. Significantly, Michael Baker's out-of-court identification of the Petitioner was made after speaking with his brother and only after his brother had made an identification.

Petitioner's trial counsel compromised the duty he owed to the Petitioner by failing to file the motion to suppress. The motion would in all probability have resulted in the exclusion of the out-of-court identification of the Petitioner and as the in-court

indentification lacked the requisite independent basis upon which to permit its admission, the Petitioner suffered prejudice to his defense. Trial counsel's failure to object to and/or challenge the in-court identification compounded the violation of the Petitioner's rights. Thus, trial counsel's omission, especially when combined with his failure to proffer special jury instructions concerning the identification testimony, and his failure to object to the instructions as given, constituted ineffective assistance of counsel and violated the Petitioner's Sixth Amendment and due process rights.

CONCLUSION

The issues raised by this appeal demand that this Court allow the writ. The failure of trial counsel to file a motion to suppress an unlawful pretrial identification which could have disposed of the State's case against the Petitioner cannot be justified under the most liberal interpretation of the harmless error doctrine. The circumstances surrounding this case demonstrate that the Petitioner was denied the effective assistance of counsel and thus due process of law by his trial lawyer's failure to investigate and raise potential defenses at trial and thereby preserve the same for appellate review. In this situation, the Supreme Court

should grant the petition for writ of certiorari.

Respectfully submitted,

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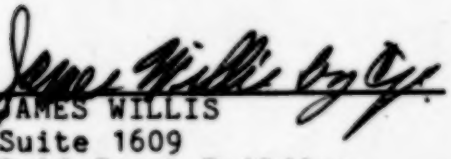
BY 

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ATTORNEYS FOR PETITIONER

APPENDIX A

Opinion of the Supreme Court of Ohio

THE SUPREME COURT OF OHIO

FOR THE EIGHTH DISTRICT

No. 82-1054

STATE OF OHIO,

Appellee,

v.

JIMMY MARSHALL,

Appellant.

APPEAL FROM THE COURT OF APPEALS

FOR CUYAHOGA COUNTY

September 15, 1982

This cause, here on appeal as of right from the Court of Appeals for Cuyahoga County, was considered in the manner prescribed by law, and, no motion to dismiss such appeal having been filed, the Court sua sponte dismisses the appeal for the reason that no substantial constitutional question exists herein.

Locher, J., not participating

It is further ordered that a copy of this entry be certified to the Clerk of the Court of Appeals for Cuyahoga County for entry.

Attest:

CLERK, SUPREME COURT OF OHIO.

APPENDIX B

Opinion of the Supreme Court of Ohio

THE SUPREME COURT OF OHIO

FOR THE EIGHTH DISTRICT

No. 82-1054

STATE OF OHIO,

Appellee,

v.

JIMMY MARSHALL,

Appellant.

MOTION FOR LEAVE TO APPEAL

FROM THE COURT OF APPEALS

FOR CUYAHOGA COUNTY

September 15, 1982

It is ordered by the Court that this motion is overruled.

Locher, J., not participating

APPENDIX C

Decision of the

Court of Appeals, Eighth District

County of Cuyahoga

Dated May 27, 1982

COURT OF APPEALS, EIGHTH DISTRICT

COUNTY OF CUYAHOGA

No. 44052

STATE OF OHIO,

Appellee,

v.

JIMMY MARSHALL,

Appellant.

JOURNAL ENTRY

AND

OPINION

This cause came on to be heard upon the pleadings and the transcript of the evidence and the record in the Common Pleas Court, and was argued by counsel for the parties; and upon consideration, the court finds no error prejudicial to the appellant and therefore the judgment of the Common Pleas Court is affirmed. Each assignment of error was reviewed and upon review the following disposition made:

This appeal arises from the denial of appellant, Jimmie Marshall's, petition to vacate the July 2, 1975 judgment of conviction[1] for two counts of felonious

---

[1]Judge August Pryatel, although assigned to the panel on appeal, disqualified himself from participating with the panel, having sat as the trial judge in the original proceedings.

assault, which resulted in his being sentenced to concurrent terms of 2-15 years at the Chillicothe Correctional Institution.[2] A direct appeal to this Court resulted in the affirmance of the judgment of the trial court on March 30, 1977.

Appellant's petition to vacate, initially filed on October 3, 1977, was responded to by appellee on October 10, 1977 with a motion to dismiss. However, no action was taken by the trial court on either the petition or the motion.

Appellant thereafter filed an identical petition to vacate the judgment

---

[2]The record reveals that appellant has been released on bail since November 6, 1976, except for a short period of time from October 9, 1980 through October 17, 1980 when his appeal bond was forfeited.

on November 24, 1980 which was similarly responded to by appellee with a motion to dismiss.[3] A post-conviction hearing was held on January 7, 1981 and on June 10, 1981 the trial court denied the petition to vacate. It is from this final judgment that appellant appeals.

The evidence adduced at the original trial was set forth by this Court as follows on appellant's direct appeal from his judgment of conviction:[4]

> "The first witness for the State of Ohio was Stanley Baker. Mr. Baker testified that on February

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[3]This second petition to vacate was precipitated by appellant's arrest in October, 1980 when his bond was forfeited.

[4]State v. Jimmie Marshall, (Eighth App. Dist., March 10, 1977) Upreported Case No. 35702.

14, 1975, at approximately 7:30 in the evening, he and his brother, Michael, were driving south on Interstate-77, when a car drove up behind them, flashing its lights. (Tr. 7). As the car came alongside, the driver motioned for Baker to roll down his window. After the window was rolled down, the driver of the approaching car reached into his glove compartment, brought out a gun, and started shooting. (Tr. 8). Baker told his brother to duck, and they then followed the other car up the exit ramp at East 49th Street and Fleet. The other car stopped at the traffic light, and when the light turned green, the Bakers passed the car, and the driver shot at them again. (Tr. 8).

Baker described the car and the gun, and identified the appellant in court as the man who had fired at him. (Tr. 9-10). The appellant, Marshall, allegedly fired three shots while on I-77, and two more after exiting I-77. (Tr. 11).

Baker testified that another adult and a child were in the front seat of Marshall's car, and that two adults and a child were in the rear. (Tr. 12). The Bakers went directly to the Newburgh Heights Police Station, and reported the incident, giving the police the license number of the car in question. (Tr 13). At the police station, Baker noticed a bullet hole in the right rocker panel, and a bullet hole above the right rear

window. (Tr. 14). The next day, while Baker was working on his car, he reexamined the bullet hole in the fender, and found the bullet near the fender well. The spent bullet was offered into evidence by the State. (Tr. 18). Photographs of Baker's car, taken by the police on February 16, and a statement made by Baker on that date were also offered into evidence." (Tr. 14-16, 34-35).

* * *

"Michael Baker was the next witness to testify. He told basically the same story as his brother (Tr. 50-62), and added that while at the Newburgh Heights

Police Station, he had observed the appellant's car approximately 150 feet away at a stop light, under a street light. (TR. 57-58). Michael also stated that the police called him and his brother to view a line-up, and that upon arriving at the Central Police Station, they saw the appellant sitting on a bench, and immediately identified him to the police. (Tr. 79-80).

The State called two police officers involved in the case to testify. One of the officers read into the record a statement made by the appellant in which he gave his version of the incident on February 14. He stated:

> 'I went to pass this car, I blinked my lights to go around

him, then he hit his brakes. So I went to the right. Then he came back over on me he was straddling the white line. [sic]. Then I got around him and I came off the ramp at Fleet Ave., and then he was waiting for me to go off the ramp at Fleet Ave. and he backed up and followed me. Then when the light changed he shot around me and that is the last that I seen him.' (Tr. 114).

At the conclusion of the State's case, the defense moved for a judgment of acquittal, pursuant to Crim. R. 29 (Tr. 142-143). The motion was overruled, and the

defense proceeded to put on its witnesses. (Tr. 144). The record does not reflect that the motion for acquittal was renewed at the end of the defense's case. The two women who were allegedly in the car with the appellant testified for the defense. They both denied that the shooting had taken place, and did not recall that anything unusual had happened. (Tr. 160, 189). The defense also put on a character witness and a bookkeeper for the Bellaire Medical Clinic. The bookkeeper testified on cross-examination that the appellant had a 'sutured laceration left index finger' which was cleaned and dressed on November 13, 1974. (Tr. 181).

The defendant testified in his own behalf. He admitted that he had experienced an encounter with the Bakers' car on I-77 on the night in question (Tr. 210). He stated that when he first noticed the Bakers' car, it was in the passing lane in front of him. He came up behind Baker in the passing lane and blinked his lights to pass him. Baker then 'hit his brakes' and when the appellant pulled to the right, Baker moved to the right. When Baker pulled back to the left, the appellant signalled to exit at Fleet Avenue, and Baker, who had been ahead of Marshall, backed up, and exited at Fleet behind him. Marshall learned who the occupants of the car were on

February 16, when the detectives came out to his home. (Tr. 210-211).

The defense rested at the end of the appellant's testimony and the guilty verdicts were returned on July 2, 1975."

Appellant is presently before this Court to appeal the denial by the trial court of his petition to vacate the judgment, originally filed October 3, 1977 and subsequently filed November 24, 1980.

Appellant argues that he was denied effective assistance of counsel as a result of trial counsel's failure to file a motion to supress the evidence of the pre-trial identification, as well as his

failure to object to the in-court identification of Stanley Baker.[5]

This Court has set forth the following synopsis of guidelines to consider when counsel's effectiveness is challenged:

"In State v. Hester, (1976), 45 Ohio St. 2d 71, 79, the Ohio Supreme Court set out the test for effective assistance of counsel as follows:

---

[5]Assignment of Error No. 1:

THE DEFENDANT IS DENIED THE EFFECTIVE ASSISTANCE OF COUNSEL AND DUE PROCESS OF LAW WHEN HIS TRIAL LAWYER FAILED TO INVESTIGATE AND R A I S E POTENTIAL DEFENSES AT TRIAL AND PRESERVE SAME FOR APPELLATE REVIEW.

'Balancing the rights of the accused and the public, we hold the test to be whether the accused under all the circumstances had a fair trial and substantial justice was done.'

The Supreme Court later elaborated on the test to be employed in State v. Lytle, (1976), 48 Ohio St. 2d 391:

'First, there must be a determination as to whether there has been a substantial violation of any of defense counsel's essential duties to his client. Next, analytically separate from the question of whether the

defendant's Sixth Amendment rights were violated, there must be a determination as to whether the defense was prejudiced by counsel's ineffectiveness.' Id. at 396.

In Ohio, a properly licensed attorney is presumed competent. Vaughn v. Maxwell, 14a (1965), 2 Ohio St. 2d 299. Therefore, the burden of proving ineffectiveness is on the defendant and it is a heavy one. State v. Smith (Cuy. Cty. Ct. App., Dec. 17, 1981), Case No. 43499, ____ Ohio App. 2d ____."

State v. Perry, (Cuy. Cty. Ct. App., March 11, 1982), Unreported Cases Nos. 43713, 43714.

If it is unlikely that the trial court would have granted the motion to supress the pre-trial identification, appellant will be unsuccessful in meeting this burden. See State v. Cummings, (Cuy. Cty. Ct. App., Dec. 4, 1980), Unreported Case No. 41090.

The basic issue raised on appeal is whether the pre-trial identification of appellant by the victim/witness Stanley Baker at the police station so tainted the witness's subsequent in-court identification as to render it inadmissible.

The United States Supreme Court in Simmons v. United States (1968), 390 U.S. 377, 384, in determining whether or not to set aside a pre-trial identification by photographs, enunciated the following two-step inquiry to assist in the

determination of whether to allow an in-court identification: (1) whether the pre-trial identification was itself"...so impermissibly suggestive as to give rise to a very substantial likelihood of irreparable misidentification," and if so, (2) whether there is nevertheless an independent source for the in-court identification. See United States v. Gambrill, 1971), 449 F.2d 1148, 1153.

In determining whether the in-court identification was the product of an improper pre-trial identification or was rather based upon the witness's independent recollection and observation of the accused, the Ohio Supreme Court has instructed that we consider "the totality of the circumstances" surrounding the identification. See State v. Lathan (1972), 30 Ohio St. 2d

92; State v. Jackson (1971) 26 Ohio St. 2d, 74.

In the instant case, we find that the pre-trial identification was not "impermissibly suggestive". The transcript of both the trial and post-conviction hearing revealed the following facts surrounding the pre-trial identification:[6]

Immediately following the highway incident, the Bakers proceeded directly to the Newburgh Heights Police Station where they not only gave the police the license number and description of the automobile which the suspect had driven, but Stanley Baker also provided the following description of the accused:

---

[6]All references to the transcript will be as follows: Trial = Tr.; Post-conviction hearing = P.C.

> ...a dark-skinned colored male approximately 40 years old, heavy set. (Tr. 89).

After tracing the license tag to appellant, the police proceeded to appellant's home on February 16, 1975 and asked that he accompany them to the police station for questioning regarding the highway incident. At the post-conviction hearing, appellant testified that he was informed that his accusers would be called to come to the station to identify him, at which time he agreed to participate in a lineup, a confrontation or a showup. (P.C. 23). Appellant was asked to be seated on a bench outside of the detective's office with two other black males in street clothes in their late thirties, until his

accusers arrived. (P.C. 28). Appellant described one man as being fair-skinned and the other one as being older, bald and having a moustache. (P.C. 35, 36).

At trial, Detective Bellito of the Cleveland Police Department testified that the men seated on the bench were victims of a crime (Tr. 108) who were waiting to speak with detectives, and suggested that appellant sit and mingle with these men on the bench. The detective described the men on the bench as having the same build and being the same age as appellant. (Tr. 109).

Upon arriving at the police station (in response to a call that they had a man (Tr. 35), Stanley Baker and his brother walked past appellant into the detective's office (Tr. 109) and identified appellant to the detective.

(Tr. 44). The detective then came out and informed appellant that he'd been identified. (P.C. 22). Detective Bellito testified that after Stanley Baker pointed out appellant on the bench, he proceeded to accuse him of being the one who had shot at him. Appellant denied this accusation, stating, "You cut me off." (Tr. 109).

Based on the foregoing evidence, it is our conclusion that the pre-trial identification procedures employed in this case were not "impermissibly suggestive". Therefore a motion to supress the pre-trial identification would not have been granted and, therefore, failure to file such a motion did not deprive appellant his effective assistance of counsel.

As to whether the in-court identification of appellant was based on Stanley Baker's independent recollection and observation of appellant at the scene of the altercation, we have considered the factors set forth in Neil v. Biggers (1972), 409 U.S. 188, 199:

> "***the opportunity of the witness to view the criminal at the time of the crime, the witness' degree of attention, the accuracy of the witness' prior description of the criminal, the level of certainty demonstrated by the witness at the confrontation, and the length of time between the crime and the confrontation."

Stanley Baker testified at trial that the lighting conditions on Interstate 77 were fairly bright, enabling him to get a good look at the accused while their cars travelled side by side down the highway at a speed of 40 m.p.h. for approximately one minute. (Tr. 26). On cross-examination he stated:

> "On 77 I got one look at the man. When you are five feet away from somebody that's pointing a gun at you, you take a good look." (Tr. 49).

Appellant himself testified that the problem with the Bakers took place over a mile's length for about five to ten minutes. (Tr. 235).

Stanley Baker testified further that he observed the accused again at the light at 49th Street and Harvard Avenue, after exiting the highway. It was after this testimony that he proceeded to make his in-court identification of appellant. (Tr. 9-10). Michael Baker also testified that he had observed appellant's car approximately 150 feet away at a stop light, under a street light. (Tr. 57-58).

Under the facts and circumstances of this case, this Court concludes that Stanley Baker's in-court identification of appellant was based upon his independent recollection of his observation of the appellant on the lighted highway. Stanley Baker provided the police with a description of appellant immediately after the incident. In addition, only

two days had elapsed from the time of the incident to the time of the pre-trial identification. Stanley Baker demonstrated a high level of certainty at both the pre-trial and in-court identification.

Finally, in considering the "totality of the circumstances" surrounding the identification, we discount the possibility of mistaken identity as we note that appellant was apprehended by the police at his home based upon a trace of the license number of his car provided to the police by Stanley Baker, thus placing him at the scene of the crime. Furthermore, we also note Detective Bellito's testimony that after informing appellant at his house of the nature of the complaint which had been filed, appellant admitted that he'd been travelling on

Interstate-77 and did, in fact, have "a little argument with some motorist in travel." (Tr. 106).

Contrary to appellant's arguments, we fail to find that the pre-trial identification was "impermissibly suggestive," nor do we find fault with the subsequent in-court identification. Based on these findings, we overrule appellant's assignment of error and hold that appellant was not denied effective assistance of counsel.

Judgment of the lower court is affirmed with instructions that appellant's bond be revoked and that his sentence to concurrent terms of 2-15 years at the Chillicothe Correctional Institution be commenced.

It is ordered that appellee recover of appellant its costs herein taxed.

The Court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this Court directing the Common Pleas Court to carry this judgment into execution.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure. Exceptions.

MARKUS, J., CONCURS

PRYATEL, C.J., NOT PARTICIPATING

Judge
JOSEPH J. NAHRA

APPENDIX D

CONSTITUTIONAL AND STATUTORY PROVISIONS

UNITED STATES CONSTITUTION

Amendment VI:

"...to have the assistance of counsel for his defense."

Amendment XIV:

"***No State shall make or enforce any law which abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws***."

UNITED STATES CODE

28 U.S.C. Section 1257(3):
"Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows:"

* * *

"(3) By writ of certiorari, where the validity of a treaty or statute of the United States is drawn in question or where the validity of a State statute is drawn in question on the ground of its being repugnant to the Constitution, treaties or laws of the United States, or where

any title, right, privilege or immunity is specially set up or claimed under theConstitution, treaties or statutes of, or commission held or authority exercised under, the United States."

Office - Supreme Court, U.S.
FILED
DEC 27 1982
ALEXANDER L. STEVAS,

No. 82-895

In the Supreme Court of the United States

October Term, 1982

JAMES MARSHALL,
Petitioner,

vs.

THE STATE OF OHIO,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE EIGHTH DISTRICT COURT OF APPEALS FOR CUYAHOGA COUNTY, OHIO

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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COUNTER QUESTION OF LAW

Respondent submits that the question presented by the record in this case is more properly stated as follows:

1. Whether petitioner was denied the effective assistance of counsel as a result of trial counsel's failure to file a motion to suppress the evidence of the pre-trial identification, as well as his failure to object to the in-court identification of Stanley Baker.

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FOR CUYAHOGA COUNTY, OHIO

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

To: The Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

OBJECTIONS TO JURISDICTION

There are no substantial federal questions involved which would require this Court to review this case.

The questions herein presented were raised in the Court of Appeals of Cuyahoga County, Ohio, and the Supreme Court of Ohio.

The Court of Appeals, Eighth Judicial District, affirmed the convictions. The Supreme Court of Ohio refused leave to appeal and dismissed an appeal as of right for the reason that no substantial constitutional question exists in this case.

The Ohio courts decided this case in accordance with statutes of the State of Ohio, the Constitution of the United States, and the applicable decisions of this Court. No substantial federal question is presented by the Petition for Certiorari.

HISTORY OF THE CASE

This appeal arises from the denial of petitioner, Jimmie Marshall's, petition to vacate the July 2, 1975 judgment of conviction[1] for two counts of felonious assault, which resulted in his being sentenced to concurrent terms of 2-15 years at the Chillicothe Correctional Institution.[2] A direct appeal to the Court of Appeals resulted in the affirmance of the judgment of the trial court on March 30, 1977.

Petitioner's petition to vacate, initially filed on October 3, 1977, was responded to by the State on October 10, 1977 with a motion to dismiss. However, no action was taken by the trial court on either the petition or the motion.

Petitioner thereafter filed an identical petition to vacate the judgment on November 24, 1980 which was sim-

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1. Judge August Pryatel, although assigned to the panel on appeal, disqualified himself from participating with the panel, having sat as the trial judge in the original proceedings.

2. The record reveals that appellant has been released on bail since November 6, 1976, except for a short period of time from October 9, 1980 through October 17, 1980 when his appeal bond was forfeited.

ilarly responded to by the respondent with a motion to dismiss.[3] A post-conviction hearing was held on January 7, 1981 and on June 10, 1981 the trial court denied the petition to vacate. The Court of Appeals, Eighth District, affirmed. The Ohio Supreme Court declined jurisdiction finding no substantial constitutional question existed for review. It is from this final judgment that petitioner appeals.

STATEMENT OF FACTS

The evidence adduced at the original trial was set forth by this Court as follows on petitioner's direct appeal from this judgment of conviction:[4]

> "The first witness for the State of Ohio was Stanley Baker. Mr. Baker testified that on February 14, 1975, at approximately 7:30 in the evening, he and his brother, Michael, were driving south on Interstate-77, when a car drove up behind them, flashing its lights (Tr. 7). As the car came alongside, the driver motioned for Baker to roll down his window. After the window was rolled down, the driver of the approaching car reached into his glove compartment, brought out a gun, and started shooting (Tr. 8). Baker told his brother to duck, and they then followed the other car up the exit ramp at East 49th Street and Fleet. The other car stopped at a traffic light, and when the light turned green, the Bakers passed the car, and the driver shot at them again (Tr. 8). Baker described the car and the gun, and identified the appel-

---

3. This second petition to vacate was precipitated by petitioner's arrest in October, 1980 when his bond was forfeited.

4. *State v. Jimmie Marshall* (Eighth App. Dist., March 10, 1977) (Unreported Case No. 35702)

lant in court as the man who had fired at him (Tr. 9-10). The appellant, Marshall, allegedly fired three shots while on I-77, and two more after exiting I-77 (Tr. 11).

"Baker testified that another adult and a child were in the front seat of Marshall's car, and that two adults and a child were in the rear (Tr. 12). The Bakers went directly to the Newburgh Heights Police Station, and reported the incident, giving the police the license number of the car in question (Tr. 13). At the police station, Baker noticed a bullet hole in the right front fender of his car, a piece of the chrome missing from the right rocker panel, and a bullet hole above the right rear window (Tr. 14). The next day, while Baker was working on his car, he reexamined the bullet hole in the fender, and found the bullet near the fender well. The spent bullet was offered into evidence by the State (Tr. 18). Photographs of Baker's car, taken by the police on February 16, and a statement made by Baker on that date were also offered into evidence (Tr. 14-16, 34-35).

* * * * *

"Michael Baker was the next witness to testify. He told basically the same story as his brother (Tr. 50-62), and added that while at the Newburgh Heights Police Station, he had observed the appellant's car approximately 150 feet away at a stop light, under a street light (Tr. 57-58). Michael also stated that the police called him and his brother to view a lineup, and that upon arriving at the Central Police Station, they saw the appellant sitting on a bench, and immediately identified him to the police (Tr. 79-80).

"The State called two police officers involved in the case to testify. One of the officers read into the

record a statement made by the appellant in which he gave his version of the incident on February 14. He stated:

> 'I went to pass this car, I blinked my lights to go around him, then he hit his brakes. So I went to the right. Then he came back over on me he was straddling the white line. [sic]. Then I got around him and I came off the ramp at Fleet Ave., and then he was waiting for me to go off the ramp at Fleet Ave. and he backed up and followed me.
>
> 'Then when the light changed he shot around me and that is the last that I seen him.' (Tr. 114).

"At the conclusion of the State's case, the defense moved for a judgment of acquittal, pursuant to Crim. R. 29 (Tr. 142-143). The motion was overruled, and the defense proceeded to put on its witnesses (Tr. 144). The record does not reflect that the motion for acquittal was renewed at the end of the defense's case.

"The two women who were allegedly in the car with the appellant testified for the defense. They both denied that the shooting had taken place, and did not recall that anything unusual had happened (Tr. 160, 189). The defense also put on a character witness and a bookkeeper for the Bellaire Medical Clinic. The bookkeeper testified on cross-examination that the appellant had a 'sutured laceration left index finger' which was cleaned and dressed on November 13, 1974 (Tr. 181).

"The defendant testified in his own behalf. He admitted that he had experienced an encounter with the Bakers' car on I-77 on the night in question (Tr.

210). He stated that when he first noticed the Bakers' car, it was in the passing lane in front of him. He came up behind Baker in the passing lane and blinked his lights to pass him. Baker then 'hit his brakes' and when the appellant pulled to the right Baker moved to the right. When Baker pulled back to the left, the appellant signalled to exit at Fleet Avenue, and Baker, who had been ahead of Marshall, backed up, and exited at Fleet behind him. Marshall learned who the occupants of the car were on February 16, when the detectives came out to his home (Tr. 210-211).

"The defense rested at the end of the appellant's testimony and the guilty verdicts were returned on July 2, 1975."

REASONS FOR DENYING THE WRIT

1. Whether petitioner was denied the effective assistance of counsel as a result of trial counsel's failure to file a motion to suppress the evidence of the pre-trial identification, as well as his failure to object to the in-court identification of Stanley Baker.

Petitioner is presently before this Court to appeal the denial by the trial court of his petition to vacate the judgment, originally filed October 3, 1977 and subsequently filed November 24, 1980.

Petitioner argues that he was denied effective assistance of counsel as a result of trial counsel's failure to file a motion to suppress the evidence of the pre-trial identification, as well as his failure to object to the in-court identification of Stanley Baker.

Ohio courts have set forth the following synopsis of guidelines to consider when counsel's effectiveness is challenged:

> "In *State v. Hester* (1976), 45 Ohio St. 2d 71, 79, the Ohio Supreme Court set out the test for effective assistance of counsel as follows:
>
> > 'Balancing the rights of the accused and the public, we hold the test to be whether the accused under all the circumstances had a fair trial and substantial justice was done.'
>
> "The Supreme Court later elaborated on the test to be employed in *State v. Lytle* (1976), 48 Ohio St. 2d 391:
>
> > 'First, there must be a determination as to whether there has been a substantial violation of any of defense counsel's essential duties to his client. Next, analytically separate from the question of whether the defendant's Sixth Amendment rights were violated, there must be a determination as to whether the defense was prejudiced by counsel's ineffectiveness.' *Id.* at 396.
>
> "In Ohio, a properly licensed attorney is presumed competent. *Vaughn v. Maxwell* (1965), 2 Ohio St. 2d 299. Therefore, the burden of proving ineffectiveness is on the defendant and it is a heavy one. *State v. Smith* (Cuy. Cty. Ct. App., Dec. 17, 1981), Case No. 43499, ... Ohio App. 2d....."
>
> *State v. Perry* (Cuy. Cty. Ct. App., March 11, 1982), Unreported Cases Nos. 43713, 43714.

It is unlikely that the trial court would have granted the motion to suppress the pre-trial identification. Petitioner will be unsuccessful in meeting this burden.

The basic issue raised on appeal is whether the pre-trial identification of petitioner by the victim/witness Stanley Baker at the police station so tainted the witness's subsequent in-court identification as to render it inadmissible.

The United States Supreme Court in *Simmons v. United States* (1968), 390 U.S. 377, 384, in determining whether or not to set aside a pre-trial identification by photographs, enunciated the following two-step inquiry to assist in the determination of whether to allow an in-court identification: (1) whether the pre-trial identification was itself ". . . so impermissibly suggestive as to give rise to a very substantial likelihood of irreparable misidentification," and if so, (2) whether there is nevertheless an independent source for the in-court identification. *See United States v. Gambrill* (1971), 449 F.2d 1148, 1153.

In determining whether the in-court identification was the product of an improper pre-trial identification or was rather based upon the witness's independent recollection and observation of the accused, the Ohio Supreme Court has instructed that we consider "the totality of the circumstances" surrounding the identification. *See State v. Lathan* (1972), 30 Ohio St. 2d 92; *State v. Jackson* (1971), 26 Ohio St. 2d 74.

In the instant case, the pre-trial identification was not "impermissibly suggestive". The transcripts of both the trial and post-conviction hearing revealed the following facts surrounding the pre-trial identification.[5]

Immediately following the highway incident the Bakers proceeded directly to the Newburgh Heights Police Sta-

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5. All references to the transcripts will be as follows: Trial = Tr.; Post-conviction = P.C.

tion where they not only gave the police the license number and description of the automobile which the suspect had driven, but Stanley Baker also provided the following description of the accused:

> ". . . a dark-skinned colored male approximately 40 years old, heavy set." (Tr. 89).

After tracing the license tag to petitioner, the police proceeded to petitioner's home on February 16, 1975 and asked that he accompany them to the police station for questioning regarding the highway incident. At the post-conviction hearing, petitioner testified that he was informed that his accusers would be called to come to the station to identify him, at which time he agreed to participate in a lineup, a confrontation or a showup (P.C. 23). Petitioner was asked to be seated on a bench outside of the detective's office with two other black males in street clothes in their late thirties, until his accusers arrived (P.C. 28). Petitioner described one man as being fair-skinned and the other one as being older, bald and having a moustache (P.C. 35, 36).

At trial, Detective Bellito of the Cleveland Police Department testified that the men seated on the bench were victims of a crime (Tr. 108) who were waiting to speak with detectives, and suggested that petitioner sit and mingle with these men on the bench. The detective described the men on the bench as having the same build and being the same age as petitioner (Tr. 109).

Upon arriving at the police station, Stanley Baker and his brother walked past petitioner into the detective's office (Tr. 109) and identified petitioner to the detective (Tr. 44). The detective then came out and informed petitioner that he'd been identified (P.C. 22). Detective Bellito testified that after Stanley Baker pointed out petitioner on

the bench, he proceeded to accuse him of being the one who had shot at him. Petitioner denied this accusation, stating, "You cut me off." (Tr. 109).

Based on the foregoing evidence, it is the State's conclusion that the pre-trial identification procedures employed in this case were not "impermissibly suggestive." Therefore a motion to suppress the pre-trial identification would not have been granted and, therefore, failure to file such a motion did not deprive petitioner his effective assistance of counsel.

As to whether the in-court identification of petitioner was based on Stanley Baker's independent recollection and observation of petitioner at the scene of the altercation, we have considered the factors set forth in *Neil v. Biggers* (1972), 409 U.S. 188, 199:

> "* * * the opportunity of the witness to view the criminal at the time of the crime, the witness' degree of attention, the accuracy of the witness' prior description of the criminal, the level of certainty demonstrated by the witness at the confrontation, and the length of time between the crime and the confrontation."

Stanley Baker testified at trial that the lighting conditions on Interstate-77 were fairly bright, enabling him to get a good look at the accused while their cars travelled side by side down the highway at a speed of 40 m.p.h. for approximately one minute (Tr. 26). On cross-examination he stated:

> "On 77 I got one look at the man. When you are five feet away from somebody that's pointing a gun at you, you take a pretty good look."

Petitioner himself testified that the problem with the Bakers took place over a mile's length for about five to ten minutes (Tr. 235).

Stanley Baker testified further that he observed the accused again at the light at 49th Street and Harvard Avenue, after exiting the highway. It was after this testimony that he proceeded to make his in-court identification of appellant (Tr. 9-10). Michael Baker also testified that he had observed appellant's car approximately 150 feet away at a stop light, under a street light (Tr. 57-58).

Under the facts and circumstances of this case anyone would conclude that Stanley Baker's in-court identification of petitioner was based upon his independent recollection of his observation of the appellant on the lighted highway. Stanley Baker provided the police with a description of appellant immediately after the incident. In addition, only two days had elapsed from the time of the incident to the time of the pre-trial identification. Stanley Baker demonstrated a high level of certainty at both the pre-trial and in-court identification.

Finally, in considering the "totality of the circumstances" surrounding the identification, we discount the possibility of mistaken identity as we note that petitioner was apprehended by the police at his home based upon a trace of the license number of his car provided to the police by Stanley Baker, thus placing him at the scene of the crime. Furthermore, we also note Detective Bellito's testimony that after informing petitioner at his house of the nature of the complaint which had been filed, petitioner admitted that he'd been travelling on Interstate-77 and did, in fact, have "a little argument with some motorist in travel" (Tr. 106).

Contrary to petitioner's arguments we fail to find that the pre-trial identification was "impermissibly suggestive," nor is there fault with the subsequent in-court identification. Based on these facts, the petitioner was not denied the effective assistance of counsel.

CONCLUSION

In conclusion, the respondent submits that the petition herein fails to present any question of constitutional dimension justifying review by the court. The petition for a writ of certiorari must be denied.

Respectfully submitted,

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